

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

YVONNE MARIA KHAN,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. [18-cv-02868-JSC](#)

**ORDER RE: PLAINTIFF'S MOTION
FOR ATTORNEY'S FEES**

Re: Dkt. Nos. 21, 22, 23

In this Social Security case, Plaintiff Yvonne Khan ("Plaintiff") seeks attorney's fees under the Equal Access to Justice Act ("EAJA") following this Court's remand of her disability insurance benefits case. (Dkt. Nos. 19 & 21.)^{1, 2} Because the Social Security Commissioner ("Defendant") does not contest the substantial justification of the original action and instead challenges only the amount of fees sought, Plaintiff's motion is GRANTED in part, as explained below.

BACKGROUND

This case stems from Plaintiff's appeal of the Social Security Administration's ("SSA") denial of her application for disability benefits for a combination of physical and mental impairments, including: degenerative disc disease, fibromyalgia, knee and shoulder problems, hand and wrist condition, bone spurs, and depression. (*See* Dkt. Nos. 1 & 19 at 1.) On June 3, 2019, the Court granted Plaintiff's motion for summary judgment, denied Defendant's cross-motion for summary judgment, and remanded for further administrative proceedings, concluding

¹ Record citations are to materials in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

² Plaintiff and Defendant have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 8, 9.)

that the Administrative Law Judge (“ALJ”) must adequately consider medical and testimonial evidence in light of Plaintiff’s fibromyalgia and reassess Plaintiff’s residual functioning capacity. (Dkt. No. 19.) Plaintiff then filed the underlying motion for EAJA fees in the amount of \$8,413.60. (Dkt. No. 21 at 2.) Plaintiff requested an additional \$400 for costs, \$21.68 for expenses, and \$674.00 (rounded from the requested \$674.025) for the time spent drafting the reply. (Dkt. Nos. 21 at 2 & 23 at 10.)

LEGAL STANDARD

Under the EAJA, a court shall award a prevailing party its fees and expenses in an action against the United States unless “the position of the United States was substantially justified or special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). The Supreme Court has defined “substantially justified” as “justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person,” or having a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The government bears the burden of establishing substantial justification. *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001).

If the government’s position was not substantially justified, then the plaintiff may be eligible for an award of fees under the EAJA; however, eligibility is not an automatic award. *Atkins v. Apfel*, 154 F.3d 986, 989 (9th Cir. 1998). Rather, the plaintiff must prove that the fees sought are reasonable. *Sorenson v. Mink*, 239 F.3d 1140, 1145 (9th Cir. 2001) (“The burden is on the plaintiff to produce evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.”) (internal quotation marks omitted).

The starting point for determining whether a fee is reasonable is “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The applicant must exercise “billing judgment,” i.e., the fees must be for services for which a private client would pay. *Id.* at 434 (“Hours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.”). Courts should generally “defer to the winning lawyer’s professional judgment as to how much time he was required to spend on the case.” *Moreno v. City of Sacramento*, 534 F.3d

1106, 1112 (9th Cir. 2008). An applicant may be awarded fees for hours spent litigating an EAJA fee award. *INS v. Jean*, 496 U.S. 154, 162 (1990).

DISCUSSION

Plaintiff moves for a total fee award of \$9,087.60, plus \$400 for costs and \$21.68 for expenses. (Dkt. No. 23 at 10.) Defendant does not contend that its position here was substantially justified. Plaintiff is therefore entitled to an award as a prevailing party under 28 U.S.C. § 2412(d.) *See Gutierrez*, 274 F.3d at 1258 (“It is the government’s burden to show that its position was substantially justified.”). The only disputes between the parties are whether the fees requested are reasonable, including whether Plaintiff is entitled to fees related to her reply brief, and whether the fees can be awarded directly to Plaintiff’s counsel.

A. Reasonableness of Fees

When awarding a party attorneys’ fees pursuant to the EAJA, the Court must determine the reasonableness of the fees sought. *Sorenson*, 239 F.3d at 1145. In establishing the reasonableness of fees and expenses under EAJA, it is Plaintiff’s burden to document “the appropriate hours expended in the litigation by submitting evidence in support of those hours worked.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). As previously discussed, the appropriate number of hours includes all time “reasonably expended in pursuit of the ultimate result achieved, in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.” *Hensley*, 461 U.S. at 431.

Here, Plaintiff submits her attorney’s affirmation in support of fees with five exhibits, the first three of which break down the time spent on the case. (Dkt. No. 21 at 4-21.) Exhibit A details the time spent by all who worked on the case in chronological order. (*Id.* at 5, 9-10.) Exhibit B breaks down the work on the case by attorney. (*Id.* at 5, 12-13.) Exhibit C breaks down the work by each paralegal. (*Id.* at 5, 15.) Plaintiff’s counsel also sets forth the requested hourly rates for attorney time and paralegal time. (*Id.* at 5.) There does not appear to be a dispute as to the hourly rates of the attorneys or the paralegals; rather, Defendant disputes the fees in general as unreasonable and “too high,” arguing that: (1) Plaintiff claims hours at both paralegal and attorney rates for tasks that were “clerical or secretarial in nature,” (2) Plaintiff “plainly overbills for some

tasks,” (3) the block billing “almost certainly inflates her claimed hours,” and (4) the multiple 0.1 hour entries “unwarrantedly increase the total time billed.” (Dkt. No. 22 at 4-6.) The Court addresses each argument in turn, and agrees that some of Plaintiff’s requested time is unreasonable. As discussed below, the Court concludes that Plaintiff is entitled to \$8,506.16 in fees.

1. “Clerical or Secretarial” Tasks

Defendant first contends that Plaintiff claims hours at both paralegal and attorney rates for tasks that were “clerical or secretarial in nature.” (Dkt. No. 22 at 4.) “[P]urely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them.” *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 288 n.10 (1989). “When clerical tasks are billed at hourly rates, the court should reduce the hours requested to account for the billing errors.” *Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009). This Court has previously noted that “[t]asks such as preparing proofs of service, processing records, posting letters for mail, photocopying, three-hole punching, internal filing, calendaring, and preparing the summons and complaint for filing have been found to be purely clerical tasks for which fees are not recoverable.” *Reenders v. Premier Recovery Grp.*, No. 18-cv-07761-PJH (JSC), 2019 WL 2583595, at *7 (N.D. Cal. May 7, 2019) (citing *Borillo v. Legal Recovery Law Offices, Inc.*, No. 5:16-cv-05508-HRL, 2017 WL 1758088, at *6 (N.D. Cal. May 5, 2017)).

Here, Defendant points to 17 time entries that are, or contain, allegedly clerical tasks that are not reimbursable. (See Dkt. Nos. 21 at 9-10 & 22 at 4-5.) Of these 17 tasks, the Court agrees that nine are non-compensable, purely secretarial tasks; specifically, the entries on May 15, 2018 (federal forms packet prepared for client completion (0.6); FDC packet sent (0.2); FDC pack returned (0.3); filing fee payment received (0.1)); May 16, 2018 (preparing summons (0.6)); May 25, 2018 (file via ECF (0.2)); July 30, 2018 (“Note Reminder to counsel re: Case number when filing” (0.1)); and August 23, 2018 (receipt of answer and notice of service of transcript (0.1); generated PDF of court transcript (1.8)). (See Dkt. No. 21 at 9.)

Plaintiff counters that tasks that are not “purely clerical” and which are routinely performed by attorneys should be reimbursable. (Dkt. No. 23 at 4 (citing *Rabadi v. Astrue*, No.

1 EDCV 03-00774-MAN, 2012 WL 13167630, at *5 (C.D. Cal. Nov. 8, 2012)).) Agreed. But the
2 tasks the *Rabadi* court found were not purely clerical are different from the tasks the Court has
3 found as stated above were clerical.

4 Because some of the time billed is clerical and thus not recoverable, the Court reduces the
5 amount of compensable time by 4.0 hours (\$568.94).

6 **2. Overbilling**

7 Defendant also contends that “Plaintiff plainly overbills for some tasks,” pointing to two
8 tasks in particular, the 0.3 hours spent reviewing a summons (May 18, 2018) and the 0.3 hours for
9 “Federal Court-Remand Referral back to Referral Source” (June 6, 2019). (Dkt. No. 22 at 5.)
10 Defendant does not identify any other instances of overbilling but indicates there are more. (*Id.*)
11 While Plaintiff counters that Defendant fails to explain how these two examples constitute
12 overbilling, Defendant relies on *Mallard* wherein the court found 0.2 hours for reviewing a
13 summons unreasonable, and where it found 0.3 hours spent referring the action “back to Referral
14 Source” overbilling. (*See* Dkt. No. 22 at 5 (citing *Mallard v. Berryhill*, No. 1:17-cv-01212 – JLT,
15 2019 WL 2389506, at *4 (E.D. Cal. Jun. 6, 2019))).)

16 In *Mallard*, the court found the 0.1 hours spent consenting to a magistrate judge to
17 constitute overbilling, saying it “is a simple check-box form that would take mere moments to
18 review,” *Mallard*, 2019 WL 2389506, at *4. While the same task is logged here at the same
19 amount of time, the Court disagrees that 0.1 hours is excessive. (*See* Dkt. No. 21 at 9).
20 Consenting to a magistrate judge requires the attorney for the party, or the party themselves if *pro*
21 *se*, to read, check, and sign the consent form that is then submitted to the court. (*See* Dkt. Nos. 8
22 & 9.) The Court finds that six minutes is not unreasonable for an attorney to read, check, and sign
23 the magistrate judge consent form and, thus, declines to reduce the hours expended on this task.
24 The *Mallard* court similarly found the 0.3 hours spent with the referral source to constitute
25 overbilling, saying only “it is unclear why referring the action ‘back to Referral Source’ after the
26 Court’s remand order would take 0.3 hour.” *Mallard*, 2019 WL 2389506, at *4. Here, absent
27 further detail, the Court finds the time spent with the referral back source to be excessive and
28 awards only 0.2 hours for the task, which is a reasonable amount of time.

1 While the *Mallard* court reduced the remaining time reported by ten percent to account for
2 overbilling and block billing, here, a ten percent cut is not warranted absent pervasive block
3 billing and overbilling issues like those found in *Mallard*. See *Mallard*, 2019 WL 2389506, at *4.
4 Rather, the Court will only reduce the time on the above-mentioned task, awarding 0.2 hours for
5 the referral source task. The 0.3 hours spent reviewing the summons was resolved in the prior
6 section and the 0.1 hour spent consenting to the magistrate judge has been resolved in this section.

7 Accordingly, the Court deducts 0.1 hours (\$12.50) for the one overbilled task.

8 **3. Block Billing**

9 Defendant contends that “Plaintiff’s block billing throughout almost certainly inflates her
10 claimed hours.” (Dkt. No. 22 at 5.) Defendant does not indicate which specific entries he takes
11 issue with and instead cites cases where courts have looked unfavorably on block billing. (*See id.*)

12 Defendant cites *Role Models America, Inc. v. Brownlee* wherein the court found the block
13 billing of sometimes unrelated tasks hindered the ability to evaluate reasonableness. (*See* Dkt. No.
14 22 at 5 (citing *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004)).)

15 Unlike in *Role Models*, however, here the task entries rarely appear to lump together multiple
16 tasks, and those that do are clearly related and pertain to one task within the case, such as October
17 17, 2018 when Stuart Barasch (Attorney) reviewed co-counsel’s brief, implemented final edits,
18 and filed. (*See* generally Dkt. No. 21 at 9-10.) The Court notes that in *Mallard v. Berryhill*, the
19 court expressed concern over block billing entries that contained compensable and clerical tasks.

20 2019 WL 2389506, at *4. While Defendant fails to point to any specific entry, the two instances
21 where Plaintiff’s counsel’s purported block billing does contain a clerical task (i.e., filing), the
22 total time spent was a mere 0.2 and 0.3 hours, neither of which seems unreasonable for time spent
23 reviewing and editing a brief, plus filing it. (Dkt. No. 21 at 10 (10/17/2018; 11/26/2018).)

24 Further, Plaintiff’s counsel’s time sheet includes multiple entries per day and either bills the time
25 at 0.00 hours for clerical work performed or, according to Plaintiff, does not include the time.
26 (*See* Dkt. Nos. 21 at 6 & 23 at 6.)

27 The Court finds the billing descriptions have not hampered the Court’s ability to evaluate
28 the reasonableness of the time billed and, thus, declines to reduce the hours sought for block

1 billing.

2 **4. 0.1 Hour Entries**

3 Defendant last contends that Plaintiff’s multiple 0.1 hour billing entries “unwarrantedly
4 increase the total time billed.” (Dkt. No. 22 at 6.) While it is true that Plaintiff records ten “0.1”
5 hour time entries, (*see* Dkt. No. 21 at 9-10), three of these ten have been resolved above, leaving
6 seven 0.1 hour entries at issue. Plaintiff notes that there are more tasks logged at 0.0 hours than
7 there are at 0.1 hours, casting doubt on Defendant’s argument that the multiple “perfunctory” tasks
8 logged at 0.1 hours “unwarrantedly increase” the total time billed. (*See* Dkt. Nos. 21 at 9-10, 22 at
9 6, 23 at 5-6.)

10 Defendant cites to *Lopez v. Astrue* wherein the court reduced the total time for multiple 0.1
11 hour entries, saying, “While the Court appreciates that counsel needs to review the docket and this
12 court’s orders, the total amount billed is *excessive* when each amount it recorded as a discrete six-
13 minute event.” *Lopez v. Astrue*, No. 1:10-cv-1012 AWI GSA, 2012 WL 2052146, at *2 (E.D. Cal.
14 Jun. 6, 2012) (emphasis added) (citing *Downey v. Astrue*, No. 1:09–cv–812 SKO, 2001 WL
15 12505824, at *12-13 (E.D. Cal. Apr. 11, 2012)). There, seven 0.1 hour entries were recorded for
16 tasks such as “reviewing court docket,” “reviewing court documents,” “reviewing defendant’s
17 consent to magistrate”, and “reviewing return receipt.” *Id.*

18 *Lopez* does not persuade the Court that a reduction is required for multiple 0.1 entries. The
19 *Lopez* entries there were either vague (“reviewing court documents on 6/8/10”) or multiple entries
20 were made for perfunctory tasks such as reviewing the docket (“.1 hours reviewing court docket
21 entry on 6/3/10”; “0.1 hours reviewing the docket on 6/29/10”) or reviewing return receipts (“0.1
22 hours reviewing return receipt on 7/14/10”; “0.1 hours reviewing return receipt on 7/16/10”).
23 *Lopez*, 2012 WL 2052146, at *2. Here, unlike *Lopez*, the remaining 0.1-hour entries left at issue
24 include, on May 25, 2018, “Review summons issued as to Commissioner, USAO, and AG,” or, on
25 August 27, 2018, “Review order reassigning case to MJ Corley-Judge Rogers no longer assigned.”
26 (Dkt. No. 21 at 9-10.) (Dkt. No. 21 at 9-10.) The 0.1 hour tasks left here are specific and
27 substantive such that they are often handled by attorneys and, accordingly, do not unwarrantedly
28 increase the total time.

Thus, the Court will not reduce the compensable hours on this basis.

5. Plaintiff is Entitled to Fees for Preparing the Reply Brief

Under the EAJA, a prevailing party is entitled to fees incurred in litigation with the government in moving for an EAJA fee award. *Jean*, 496 U.S. at 161; *see also Love v. Reilly*, 924 F.2d 1492, 1487 (9th Cir. 1991). Plaintiff’s request for \$674.00 (rounded) for the 3.3 additional hours spent drafting the underlying reply brief is reasonable and on par with, or less than, what this Court and others have granted in similar cases. *See, e.g., Valle v. Berryhill*, No. 16-cv-02358-JSC, 2018 WL 1449414, at *3 (N.D. Cal. Jan. 18, 2018) (awarding \$1910.51 for 9.75 additional hours preparing the reply brief); *Potter v. Colvin*, No. 14-cv-02562-JSC, 2015 WL 7429376, at *4 (N.D. Cal. Nov. 23, 2015) (awarding \$569.04 for three hours of work preparing the reply brief); *Lauser v. Colvin*, No. 13-05990-MEJ, 2015 WL 1884330, at *5 (N.D. Cal. Apr. 23, 2015) (awarding \$1,110.21 for fees for preparing the reply brief); *Smith v. Astrue*, No. C 10–4814 PJH, 2012 WL 3114595, at *5 (N.D. Cal. July 31, 2012) (granting fees for 2.6 hours of work spent preparing the reply brief on the fees motion).

Accordingly, the Court awards Plaintiff \$8,506.16 in attorneys’ fees.

B. The Fee Award Should Be Paid Directly to Counsel

As previously discussed, under the EAJA “a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in a civil action (other than cases sounding in tort) . . . unless the court finds that the position of the United States was substantially justified.” 28 U.S.C. § 2412(d)(1)(A). In *Astrue v. Ratliff*, 560 U.S. 586, 594 (2010), the Supreme Court considered this provision of the EAJA and whether it makes a fee payable to the prevailing party or the attorney. The Supreme Court noted the absence of language in the EAJA explicitly directing fees to attorneys and compared EAJA with a provision in the Social Security Act making fee awards payable “to such attorney.” *Id.* at 595 (citing 42 U.S.C. § 406(b)(1)(A)). In so doing, the Court concluded that “given the stark contrast between the SSA’s express authorization of direct payments to attorneys” and the absence of such language in EAJA, it would not interpret EAJA to “contain a direct fee requirement [to the attorney] absent clear textual evidence

supporting such an interpretation.” *Id.* at 595.

Courts in this District have nonetheless concluded that *Ratliff* does not prevent payment of a fee award directly to the attorney if there has been a valid assignment and the plaintiff does not owe a debt to the government. *See Hampton v. Colvin*, No. 13-CV-04624-MEJ, 2015 WL 1884313, at *7 (N.D. Cal. Apr. 23, 2015); *Yesipovich v. Colvin*, No. 15-00112-WHA, 2015 WL 5675869, at *8 (N.D. Cal. Sept. 28, 2015); *Neilsen v. Colvin*, No. 13-173-NJV, 2014 WL 1921317, at *3 (N.D. Cal. May 13, 2014); *Lloyd v. Astrue*, No. 11-4902-EMC, 2013 WL 3756424, at *4 (N.D. Cal. July 16, 2013); *Palomares v. Astrue*, No. 11-4515-EMC, 2012 WL 6599552, at *9 (N.D. Cal. Dec. 18, 2012).

Defendant asks that if the Court awards EAJA fees, that “it specify that the assignment cannot be honored without prior consideration by the Treasury Offset Program,” wherein “the government considers any assignment of EAJA fees to determine whether they are subject to offset” of government debt. (Dkt. No. 22 at 6-7.) As Plaintiff assigned her EAJA fees to the Olinsky Law Group (*see* Dkt. No. 21, Ex. F at 21), Plaintiff’s award shall be paid directly to the Olinsky Law Group subject to any outstanding federal debt offset determined by the Treasury Offset Program.

CONCLUSION

For the foregoing reasons, Plaintiff’s motion for an award of attorneys’ fees pursuant to EAJA is GRANTED in part, awarding Plaintiff a total award of \$8,927.84, including \$8,506.16 in fees, \$400 in costs, and \$21.68 for expenses for 40.7 hours of work. (Dkt. No 21.) The award should be paid directly to Plaintiff’s counsel, Olinsky Law Group, less any administrative offset due to Plaintiff’s outstanding federal debt, if any exists.

IT IS SO ORDERED.

Dated: October 11, 2019


JACQUELINE SCOTT CORLEY
United States Magistrate Judge